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THE CASE FOR TEACHING JAPANESE LAW AT AMERICAN LAW SCHOOLS

*Kenneth L. Port**

Teaching Japanese law in American law schools may not currently rank as the single most important curriculum need to be filled, but as the relationship between the United States and Japan becomes increasingly complex and "legal" in nature, real knowledge of (not just exposure to) Japanese systems, including the legal system, will be an absolute necessity for any attorney engaged in a sophisticated practice in the United States. Furthermore, for any law student, comparing the role of law in any given society can be enlightening. In this age of creeping student consumerism, it is even more fundamental that law professors continue to push students to think the unthinkable and learn the apparently unlearnable. It is through such a process that a student's mind grows, which in turn develops the student's ability to think creatively and develop new methods of problem-solving.¹ Toward these ends, studying Japanese law is unquantifiably beneficial.

Americans have been slow to give the Japanese legal system the serious study it deserves.² Although many schools dedicate significant resources to the study of Japan, Japanese law is taught on a regular basis at only a few law schools.³ In fact, it is difficult for some educators to even conceive of the relevance of teaching and studying a system they perceive to be radically different from their

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1. Anthony D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 471 (1987).

2. So have most comparativists as well. See *infra* notes 22-26 and accompanying text (discussing how, until recently, comparativists inappropriately lumped Japan's legal system together with those of other Asian countries).

3. Although this list is not inclusive, law schools at the University of Chicago, the University of Washington, UCLA, and Boston University all offer regular courses in Japanese law.

own.

Americans should keep in mind that the Japanese have been studying the United States's legal system, markets, business systems, distribution networks, product requirements, and consumer preferences for forty-five years. The Japanese are now able to sell high-quality products in the United States at reasonable prices, beating their American competitors at their own game in the Americans' backyard. If U.S. corporations expect to ever truly "open" Japanese markets, the very first step is to gain knowledge and understanding of those markets and the elements which make them work. For lawyers, there is no better place to start than by studying the Japanese legal system.

The major stumbling block in this pursuit is the current trend in the United States to be either a "Japan basher" or, at the polar opposite, a complete "Japan sympathizer." The Japan basher spends a significant amount of time and energy pointing out the negative results of American business contacts with Japan. The Japan basher emphasizes how Japanese law may appear to be facially neutral but is applied to favor the Japanese, how the Japanese protect their own and are hostile to Americans, and how the Japanese distribution system is so complicated and intertwined with the *keiretsu* system⁴ that an American corporation has no chance of success.

The Japan sympathizer, on the other hand, is usually forced into the defensive and spends time and energy defending Japan. The sympathizer points out how some American companies (such as

4. The Japanese *keiretsu*, or "corporate conglomerate," is a system of interrelating corporations generally organized around one central major bank. Corporations within each *keiretsu* do most of their business with other corporations within their own *keiretsu*. For example, in 1985, 51 percent of all capital borrowed by Sumitomo Metal Industries came from its top ten shareholders, all members of the Sumitomo *keiretsu*. For an excellent and objective review of the Japanese *keiretsu*, see Michael L. Gerlach, *Twilight of the Keiretsu? A Critical Assessment*, 18 J. JAPANESE STUD. 79 (1992). The *keiretsu* has been viciously attacked by corporate America and the United States media as a major barrier to American corporations doing business in Japan.

The parallels to the *zaibatsu*, or "family conglomerate corporation" — which were abolished during the United States's occupation of Japan after World War II — are quite striking. The *zaibatsu* were individual family-owned and -controlled conglomerates that existed from the Meiji Era (1868-1912) until the end of World War II. There were many *zaibatsu*, but the top four included Mitsui, Mitsubishi, Sumitomo, and Yasuda. At the end of World War II, all of the *zaibatsu* were abolished and purged due to their role in arming Japan and facilitating the war effort. After the United States's occupation, these corporate groups reformed into what are now the *keiretsu*. *Keiretsu* differ from *zaibatsu* in that *keiretsu* are not owned or controlled by one single family and in that the individual companies that make up each *keiretsu* have much more autonomy. DOROTHY PERKINS, *ENCYCLOPEDIA OF JAPAN: JAPANESE HISTORY AND CULTURE, FROM ABACUS TO ZORI* 391 (1991).

Coca-Cola, KFC, 7-11, and McDonald's, to name a few) have succeeded in Japan, how poor decision-making by corporate America has caused American companies to fail in Japan,⁵ how Japanese thinking and decision-making is really the enlightened way, and how Americans too could succeed if they would only adopt Japanese-style management techniques.

Taken to their extremes, both the Japan basher and the Japan sympathizer are misguided. Japan bashing focuses on stereotypes that may or may not be based on reality, while Japan sympathizers fail to recognize that Japanese systems and structures are culturally based and would not work *in toto* in other settings.⁶ In teaching Japanese law, an attempt should therefore be made to avoid either of these two extremes; rather, the class should be taught from an objective perspective. Otherwise, the subject's incredible potential for a provocative reading, analysis, and discussion of the role of law in any given society would be wasted.

I. OBJECTIVES OF A JAPANESE LAW COURSE

Japanese law is, ideally, a general course offered and designed for the non-Japanese speaker with little or no background in Japanese traditions or systems.⁷ The first objective of a course in Japanese law is to raise student consciousness. The mass media, which serves as the general source of information regarding Japan for most law students, paints a picture of the Japanese legal system as either so

5. For example, a story is commonly told that A&W Root Beer tried to set up drive-in restaurants in Japan during the 1960s, when few people in Japan had cars. Not surprisingly, the drive-ins did not prosper. This story is used to illustrate poor decision-making by U.S. corporations due to their ignorance of local customs and habits and their mistaken assumption that a product will sell merely because it has sold in the United States. In attempting to confirm this story, I contacted the public relations department at A&W Root Beer. I was told that no one there could remember such an attempt by the company and that they did not have the "historical records" available to confirm or deny it. Telephone Conversation with Mary Owens, public relations officer, A&W Restaurants, Inc. (July 27, 1993).

6. That is, of course, not to say that the theories of each camp are not helpful to a greater understanding of Japan and Japanese law. See John O. Haley, *Lessons from a Changing Japan*, 2 PAC. RIM L. & POL'Y J. 1 (1993) (stating that a shared belief in family and community enables the Japanese to work hard, cooperate, and compete in order to improve themselves and their neighbors, and that this attitude results in a lower crime rate and a generally happier existence).

7. First, it should be noted that the Japan specialist may and should take the course, but since there are relatively few Japan specialists in American law schools, they should play a supportive role in the general instruction. Although the specialists should be encouraged to pursue their study through seminars or independent studies, a general Japanese law course should draw on their knowledge by having them make subject-specific presentations; this would allow other students to pursue topics that interest them on a deeper level than would otherwise be possible.

dysfunctional that its basic legitimacy is implicitly questioned,⁸ or in utopian terms that Americans should emulate.⁹ Neither picture, of

8. See, e.g., James Sterngold, *Japan's Rigged Casino*, N.Y. TIMES, Apr. 26, 1992, § 6 (Magazine), at 24, 48 [hereinafter Sterngold, *Rigged Casino*] (implying that the Japanese judiciary's lack of contempt powers leaves it so powerless that successful plaintiffs sometimes resort to hiring mobsters to help collect their judgments); James Sterngold, *Japanese Election: Unconstitutional But Valid*, N.Y. TIMES, July 26, 1992, § 1, at 10 (illustrating the "vast difference in independence and authority" between the Japanese Supreme Court and its U.S. counterpart by focusing on the Japanese Court's refusal to invalidate the subsequent parliamentary elections even though it had held that Japan's election law violated the principle of proportional representation); Teresa Watanabe, *Victims of a Safe Society; Behind Japan's Low Crime Rate and Civilized Streets is a Criminal Justice System Criticized as the Most Backward in the Industrialized World*, L.A. TIMES, Feb. 27, 1992, at A1 (noting that the Japanese criminal justice system is condemned as "the most backward in the civilized world"); 20/20: *Japan's Iron Hand* (ABC television broadcast, July 24, 1992), available in LEXIS, Nexis Library, SCRIPT File (charging that the Japanese criminal justice system operates like those found in the Middle Ages or a dictatorship by coercing confessions through beatings, denial of phone calls, and denial of bail).

Further challenges to the legitimacy of the Japanese system include U.S. media coverage of the Japanese election held on July 18, 1993, and the events leading up to this election. According to some accounts, one would be led to believe that the entire political system (not just the ruling Liberal Democratic Party ("LDP")) is a house of cards. See James Sterngold, *Japanese Forget Politeness As Political Wrath Flares*, N.Y. TIMES, July 23, 1993, at A2 (discussing the woes of the Japanese Parliament subsequent to the LDP's ouster from power). Just because Shin Kanemaru — the deposed leader of the LDP — had apparently taken large sums of cash as bribes does not necessarily mean that the entire system is illegitimate and should not be taken seriously. We know that many American politicians have been caught with their hand in the cookie jar, so to speak, yet that fact does not cause anyone to seriously believe that the underlying American legal system is illegitimate.

Also, in an apparent attempt to impress and attract clients, some law firms in the United States are now publishing "newsletters" with regard to doing business in Japan. Some of these newsletters are actually informative, accurate, and of very high quality; some are almost frighteningly negative in tone. One newsletter claims that Japanese lawyers do not represent the interests of their clients and implies that they instead represent only the interests of Japan, a complaint so common it is almost cliché. See *The Case Against Arbitration Clauses*, JAPAN UPDATE (Law Offices of Thomas Flannigan, Chicago, Ill.), July 1993, at 1, 2. In fact, *Japan Update*, now known as the *Japan Observer*, takes bashing the Japanese legal system to the extreme. It claims (not incorrectly) that arbitration done in Japan must be conducted in the Japanese language, that Japanese litigation is time-consuming, and that Japanese lawyers try to take advantage of the legal system to benefit their clients. *Id.* at 1-2. These are held out as negative aspects of the Japanese legal system, factors which are supposed to make the Japanese system unfair and illegitimate. The absolute ethnocentricity implicit in these statements is truly astounding. That the Japanese language is required in arbitrations in Japan should not surprise anyone; after all, the Japanese language is not allowed in U.S. courts or arbitration proceedings. Furthermore, all good American attorneys use the legal system to their advantage whenever they can. If they did not, we would consider them incompetent. Why zealous use of the legal system is bad if done by a Japanese attorney but not by an American attorney confuses me. This example only serves as further evidence that law students are in desperate need of a legal education which makes it clear that just because the Japanese legal system is not an American system, it is not illegitimate.

9. Examples of this scenario generally come from the field of business. Notions that Japanese "quality control circles," "Just-In-Time" management, and other management techniques were cure-alls for American economic woes were very popular during the 1980s. E.g., Ezey Dar-el, *The "Productivity Option" to Annual Aid From U.S.*, JERUSALEM POST, Nov. 22, 1991, available in

course, is absolutely true.

Rather, the Japanese legal system has some elements that appear to work quite well and others that appear not to work so well. An examination of these elements should be approached on a sophisticated level with objective analysis and discussion. That is, rather than being viewed as an esoteric, completely foreign system from which Americans can learn nothing, the Japanese legal system should be respected and studied as a modern legitimate system that is extremely instructive on many topics, including the role of law in any society.

Therefore, by studying Japanese law, students are able to see familiar problems that arise in another culture and are dealt with by generating and applying laws very similar to our own, but with sometimes unexpected results. Thus, the consciousness of students regarding law in a global sense is heightened; students will be able to recognize the basic legitimate principles upon which the Japanese system is based.

The second objective of teaching Japanese law to American law students is to make students think in ways they had previously not considered. For example, how can a modern, legitimate society accept a Supreme Court ruling that a statute is unconstitutional but still valid?¹⁰ Why are the Japanese more likely to follow non-binding guidances from the government¹¹ than harsh, binding, rigid laws?¹² In pursuing answers to these and many other questions, students are forced to expand their accepted realms of thought to in-

LEXIS, Nexis Library, CURRNT file; Lee Sands, *Zero Defect: Get it Right the First Time*, DENVER BUS. J., Feb. 14, 1992, § 1, at 3; Bruce Stokes, *Export Platform*, NAT'L J., May 25, 1991, at 1258. See also SHERIDAN M. TATSUNO, *CREATED IN JAPAN* (1990) (stating that the Japanese have moved from imitators to innovators and will surpass all others in their innovative genius); Michael Janofsky, *A Corporate Campaign Tries Selling Toyota's U.S. Presence*, N.Y. TIMES, July 21, 1993, at D24 (discussing Toyota's clever advertising campaign emphasizing the company's expenditures on American parts and employees).

10. Judgment of Nov. 7, 1983 (Tokyo Election Comm'n v. Koshiyama), Saikosai [Supreme Court], 37 Minshū 1243 (Japan); Judgment of Apr. 14, 1976 (Kurokawa v. Chiba Prefecture Election Comm'n), Saikosai [Supreme Court], 30 Minshū 223 (Japan).

11. Better known as *gyosei shido*, or "administrative guidance." See generally Russell A. Yeoman, *Administrative Guidance: A Peregrine View*, 19 LAW JAPAN 125 (1986) (discussing the evolution of administrative law in Japan); Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984) (discussing the nature of administrative guidance and judicial review of this regulatory scheme).

12. See Kenneth L. Port, *The Japanese International Law "Revolution": International Human Rights Law and Its Impact in Japan*, 28 STAN. J. INT'L L. 139, 165-70 (1991) (comparing Japanese acceptance of social welfare rights to their resistance to imposed civil rights).

clude responses they would not have made before taking the course; students are forced to recognize that the role of law differs according to the social make-up and history of a given people. This is quite a revelation for most American law students, who are generally educated to believe that American solutions are the first, best, and only logical responses to any given problem.

II. WHY SHOULD JAPANESE LAW BE PART OF THE CURRICULUM?

A. *Japanese Law as Comparative Law*

Japanese law works exceptionally well as a course in comparative law. The two generally articulated purposes of comparative law discourse are to either learn from foreign laws in order to improve domestic laws, or to learn from foreign laws in the greater pursuit of knowledge regarding "law" in any society.¹³

Teaching Japanese law as legislative comparative law — studying Japanese solutions to legal issues that may be adaptable in this or any other country — is a worthwhile undertaking. Because the societies of Japan and the U.S. are so culturally distinct, at first blush it is difficult to see where one could learn anything of value from the Japanese use of law. That, perhaps, is the most instructive point. Law in Japan is extremely culture-based; laws that work their intended function in Japan do so because they are closely allied with cultural values, values which are as much as two thousand years old. The most effective "law" in Japan is the one that is vague and voluntary.¹⁴ In the debate over whether law structures culture or culture structures law,¹⁵ it is quite clear that in the Japanese setting,

13. As a course in comparative law, Japanese law also allows for the pursuit of standard comparative law inquiries — legislative comparative law (the study of foreign laws aimed at improving the process and content of new domestic legislation) and theoretical comparative law (the study of foreign law aimed at improving our understanding of law in general). KONRAD ZWIEGERT & HEIN KÖTZ, 1 AN INTRODUCTION TO COMPARATIVE LAW: THE FRAMEWORK 44 (Tony Weir trans., 1977). Because Japanese law — based as it is on statutes of Western origin — reaches outcomes very distinct from those of other legal systems, the study of Japanese law as theoretical comparative law may have greater returns than a study of it as legislative comparative law.

14. See generally Port, *supra* note 12, at 165-70 (comparing Japanese acceptance of social welfare rights to their resistance to imposed civil rights).

15. See, e.g., Edward Greer, *Antonio Gramsci and "Legal Hegemony,"* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 304-09 (David Kairys ed., 1982) (arguing that no legal analysis is complete without a determination of the relationship between law, culture, and social structure). For a helpful review of literature addressing both Japanese culture and structure, see *Annotated*

the latter holds true.

Japanese law as theoretical comparative law is even more rich in material. This is because Japanese law does not fit neatly into the generally accepted confines of comparative law. For example, Konrad Zweigert and Hein Kötz have written that the fundamental purpose of comparative law is functionality;¹⁶ that is, "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."¹⁷ Although Zweigert and Kötz are appropriately well-respected comparativists, the Eurocentricity of their analysis is astounding. In fact, what makes Japanese law interesting as theoretical comparative law is the fact that Japan has confronted problems very similar to those of the West, with very similar Western statutes, and has come to completely *distinct* results.

For example, much attention has been given lately to America's attempts to get Japan to enforce its antitrust laws.¹⁸ However, these antitrust laws are foreign concepts that were forced upon the Japanese during the Allied Occupation after World War II.¹⁹ As a totally foreign concept, it should not be surprising that Japan has been reluctant to enforce these laws. On the other hand, much of the current codified Japanese law was based either extensively or in part on non-Japanese sources.²⁰ Therefore, the mere fact that the antitrust law was not of pure Japanese origin would not seem to be a complete excuse for its nonenforcement. Thus, more issues must be involved than just the foreign origin of the antitrust law. The Japanese, however, thrive on such dichotomies which appear to leave one hanging and intellectually unsatisfied.²¹

Bibliography: Japanese Law and Society, 21 LAW JAPAN 219, 220-28 (1988). This does not mean that I accept entirely or exclusively the Traditionalist's model for describing law in Japan. See *infra* notes 78-85 and accompanying text (discussing Traditionalist theory).

16. ZWIEGERT & KÖTZ, *supra* note 13, at 25.

17. *Id.*

18. Antimonopoly and Fair Trade Maintenance Act ("Antimonopoly Act"), Law No. 54, 1947. See also Andrew Pollack, *U.S. Appears to Retreat From Setting Targets to Increase Japan's Imports*, N.Y. TIMES, July 10, 1993, § 1, at 4 (noting that upcoming talks between the U.S. and Japan will include discussions about Japan's increased enforcement of its antitrust laws); Teresa Watanabe, *Stacking the Bids in Japan*, L.A. TIMES, Oct. 30, 1993, at A1 (discussing anticompetitive practices in Japan).

19. John O. Haley, *Japanese Antitrust Enforcement: Implications For United States Trade*, 18 N. KY. L. REV. 335, 336-40 (1991) [hereinafter Haley, *Antitrust Enforcement*].

20. See *infra* notes 62-68 and accompanying text (discussing the non-Japanese origin of Japanese laws).

21. Problems, I might add, that have no easy answer; I will therefore not posit any superficial

This is also a provocative manner in which to present legal material to students and encourage interesting debate as they work through such problems. This study of the distinct results using very Western legal regimes makes the analysis of Japanese law as theoretical comparative law fascinating.

Another purpose of comparative law is to explore the role of law through another culture. Toward that end, comparative law analysis attempts to categorize legal systems into groups.²² Japanese law has defied categorization by the best comparative law scholars. In fact, until recently the Japanese legal system was merely classified as "one of those Asian systems."²³ Because so much of current statutory Japanese law is heavily based on Western European law, calling Japan's legal system another "Asian system" is misleading.

That did not stop Kurt Ebert from categorizing Japanese law and Chinese law together as "Far Eastern Law,"²⁴ or René David and John Brierley from categorizing Japanese law as "Religious and Tradition Law" under "Laws of the Far East,"²⁵ or Zweigert and Kötz from grouping Japanese law with Chinese law as part of the "Far Eastern Legal Family."²⁶ The common thread that held Japanese law together with Chinese law was the existence of extra-legal methods of dispute resolution.²⁷ The institutionalization of concepts such as mediation and conciliation made these comparativists skeptical regarding whether "law," as Westerners understand the term, would be given true effect in Japan. For example, David and Brierley question whether Japan has undergone any real change since World War II and the so-called "Westernization" of its legal system.²⁸ They even question whether or not the ideas of law and justice have become accepted in Japan as the terms are understood in the West.²⁹

answers here.

22. See generally ZWIGERT & KÖTZ, *supra* note 13 (categorizing all of the world's legal systems into six families).

23. See *infra* notes 24-26 and accompanying text (noting instances where writers have lumped Japanese law together with other Asian legal systems).

24. KURT H. EBERT, *RECHTSVERGLEICHUNG: EINFÜHRUNG IN DIE GRUNDLAGEN* 109-18 (1978).

25. RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 534-46 (1985).

26. ZWIGERT & KÖTZ, *supra* note 13, at 358.

27. See DAVID & BRIERLEY, *supra* note 25, at 537-38, 543-45.

28. *Id.* at 540.

29. *Id.*

Therefore, the mere act of attempting to categorize Japanese law remains one of the more challenging and instructive tasks facing the comparativist. One thing can be said for certain: because of the heavy original influence from Chinese law in the sixth century, European law in the nineteenth century, and American law in the twentieth century,³⁰ Japanese law certainly stands in a category of its own and does not fit easily into any of the "Far Eastern families."

B. Student Demand

In addition to its valuable role in any comparative law curriculum, Japanese law is actually in great demand among students. To verify this demand, one need only look to the number of students that enroll in such courses when they are offered. Even when relegated to odd times and odd days, students still enroll in larger-than-expected numbers.³¹

Part of the large enrollment may be due to the students' perceived advantage in taking Japanese law. Students, correctly or incorrectly, believe that taking a course in Japanese law sets them apart from the other students graduating from law school with an interest in "international law." One student even went so far as to ask whether taking Japanese law would help him "psych-out" the Japanese in his anticipated future business dealings.³²

C. Japan's Present and Future Role in the World Economy

It should no longer shock anyone to hear that Japan's economy is the second largest economy in the world, as measured by Gross Do-

30. See Port, *supra* note 12, at 151-52 (arguing that because Japan has continuously looked abroad for tools for transformative social change, Japan will now look to the international community and international law rather than only to America as the latter's position as a legal, cultural, and social role model wanes).

31. There were thirty-five students enrolled in my Japanese Law class in the fall of 1992 when the course was offered on Thursday nights from 7:30-9:30.

32. Of course, a student could take the course for the sole purpose of winning mind-games against the Japanese in the future. In fact, that may be what the future has in store for us. However, I would prefer that people think of the subject on a deeper level. A law student does not learn contract law so that he or she can "psych-out" clients, judges, and other attorneys in the future; one learns contract law because it is a fundamental statement of how American jurisprudence works. Without contract law knowledge, we would say that a person's legal education was lacking something. This is my perspective on Japanese law. The information or knowledge gained by students should be used to enrich and enlighten the student's entire career.

mestic Product ("GDP").³³ What is surprising to most is that Japan's economy is twice the size of Germany's³⁴ and that the ten largest banks in the world (as ranked by deposits) are Japanese.³⁵ There are those who believe that by the year 2000, Japan's economy will be the largest in the world.³⁶ Japan is already the world's largest creditor nation,³⁷ while the United States has become the world's largest debtor nation.³⁸ Japan is also now the largest investor in the United States; the outstanding balance of direct Japanese investment in the U.S. has reached \$96.7 billion — an increase of \$3.8 billion during 1992 alone.³⁹ Japan's total investment accounts for 23 percent of all foreign investment in the United States.⁴⁰ Meanwhile, the world's balance of trade continues to tilt in Japan's favor. In 1992, Japan had a trade surplus of nearly \$130 billion, \$49 billion of which was with the United States.⁴¹

33. Mario Cuomo, *Bush Should Have Visited Japan*, N.Y. TIMES, Nov. 14, 1991, at A29; James D. Robinson III, *For a Japanese Equivalent of the Marshall Plan*, N.Y. TIMES, May 3, 1986, § 1, at 27; David E. Sanger, *Mourning Fails to Slow Japan's Economy*, N.Y. TIMES, Jan. 10, 1989, at D1. There are some reports, however, that China may have overtaken Japan. Nicholas D. Kristof, *Stirring Giant: China's Awakening Economy*, N.Y. TIMES, Feb. 14, 1993, at A1.

34. David Crane, *Few Signs Japan Set for Role as Global Economic Leader*, TORONTO STAR, Feb. 11, 1992, at C2, available in LEXIS, Nexis Library, CURRNT file.

35. DANIEL BURNSTEIN, YEN! JAPAN'S NEW FINANCIAL EMPIRE AND ITS THREAT TO AMERICA 37 (1988).

36. See *id.*; HERMAN KAHN, THE EMERGING JAPANESE SUPERSTATE: CHALLENGE AND RESPONSE 2 (1970); EZRA F. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA 21 (1979). With the current recession in Japan and the continued lackluster performance of the Japanese stock market, this prediction now seems more alarmist than prophetic. See James Sterngold, *A Missed Opportunity in Japan?*, N.Y. TIMES, Nov. 28, 1993, § 3, at 13.

37. Japan overtook the United States as the world's leading creditor in 1986. Robinson, *supra* note 33, at 27.

38. In fact, the United States's debt now stands at over \$2.5 trillion. *Japan No. 1 Foreign Investor in United States in 1992*, JAPAN ECON. NEWSWIRE, July 1, 1993, available in LEXIS, Nexis Library, CURRNT File [hereinafter *Japan Investor*]. See also BURNSTEIN, *supra* note 35, at 37 (discussing the United States's transformation from a creditor nation to a debtor nation); Steven R. Weisman, *An American in Tokyo*, N.Y. TIMES, July 26, 1992, § 6, at 24 (noting Japan's increasing surprise and dismay at America's transformation from the world's biggest creditor to the world's largest debtor over the last decade).

39. See *Japan Investor*, *supra* note 38.

40. *Id.*

41. There seems to be some confusion regarding the actual trade deficit figures; the numbers change depending on the source. See, e.g., *Japan Urged to Support U.S. Economic Renewal*, JAPAN ECON. NEWSWIRE, Mar. 3, 1993, available in LEXIS, Nexis Library, CURRNT File (declaring a "record" surplus of \$107 billion, \$43.6 billion of it with the U.S.); *Japan's FY '92 Trade Surplus at Record 111 Bil. Dlr.*, JAPAN ECON. NEWSWIRE, Apr. 13, 1993, available in LEXIS, Nexis Library, CURRNT File (citing a total surplus of \$111.34 billion, \$46.11 billion of it with the U.S.); *Kantor Calls Surplus Reduction Japan's Duty*, JAPAN ECON. NEWSWIRE, June 11, 1993, available in LEXIS, Nexis Library, CURRNT File (noting a "current-account surplus")

As a countermeasure to this developing scenario, the Bush Administration pursued the so-called "structural impediments initiative" ("SII").⁴² The goal of SII was to identify institutional barriers to access in the Japanese market and then pressure the Japanese to change or abolish these barriers using essentially all law-based measures. The initiative was spearheaded by Carla Hills, the U.S. Trade Representative under Presidents Ronald Reagan and George Bush. Ms. Hill was better known in Japan as "Crowbar Carla" for her aggressive attempts to open the Japanese market.⁴³

Even after all the tough talk and countermeasures implemented by the United States via SII, the trade imbalance with Japan continues.⁴⁴ This seems to indicate that SII was not effective in improving trade relations with Japan. In fact, SII has more likely only caused hard feelings among the Japanese, which, of course, harms future United States-Japan relations. Even if Japan does capitulate and amend certain laws to allow easier access to Japanese markets by U.S. goods, there is no evidence that this will do anything but increase underlying negative feelings by the Japanese regarding the "American way."

Furthermore, most of East Asia now aggressively pursues a "look-East" policy.⁴⁵ Under a "look-East" policy, countries such as Singapore, Korea, and Taiwan — countries which used to look to the West (particularly the United States) for investment guidance and influence — are now looking to Japan. Therefore, Japan's economic

total of \$117.62 billion, "about 50 billion dollars of trade surplus with the United States"); Ikuji Nakaya, *Tokyo's Concern Shifts From Yen to Trade*, JAPAN ECON. NEWSWIRE, Apr. 30, 1993, available in LEXIS, Nexis Library, CURRNT File (noting that the total surplus was \$130 billion, \$49 billion of it with the U.S.).

42. See generally BRUCE E. CLUBB, 1 UNITED STATES FOREIGN TRADE LAW 247-48 (1991) (describing the origins of SII). See also Abbott B. Lipsky, Jr., *Current Developments in Japanese Competition Law: Antimonopoly Act Enforcement Guidelines Resulting From the Structural Impediments Initiative*, 60 ANTITRUST L.J. 279 (1991) (noting that SII may have some short-term benefits by helping to avoid a trade war, but that few scholars could argue that it will possibly result in any significant long-term changes in Japanese competition law).

43. *Crowbar Carla Strikes Again*, ECONOMIST, July 14, 1990, at 34; *Profiles of Some Key Players at the GATT Talks*, REUTERS BUS. REP., Dec. 4, 1990, available in LEXIS, Nexis Library, ARCHIV File.

44. The February, 1994 trade deficit with Japan was \$4.63 billion, and the January figure was \$4.62 billion. Lucinda Harper, *Trade Deficit Grew Sharply in February*, WALL ST. J., April 20, 1994, at A2.

45. Michael Richardson, *A Multiparty Japan Could Send Shockwaves Through Other Asian States*, INT'L HERALD & TRIB., July 16, 1993, available in LEXIS, Nexis Library, CURRNT File.

influence is strongly felt and recognized throughout East Asia.⁴⁶ In order to do business on a competitive basis in East Asia (not just in Japan), an American attorney or businessperson must have a working understanding of the Japanese system. This understanding must not be just the superficial perception, too often created by the media, of an illegitimate system that does not work.⁴⁷ Rather, this understanding should be of a sophisticated system that is effective in meeting its own (Japanese) goals. Dismissing the Japanese system out of hand as unfair or illegitimate because it is different from ours only creates more opportunities for Japanese companies to succeed. While Americans are wasting their time bashing Japanese laws and demanding change, Japanese companies are making further inroads into U.S. markets. When Toyota came to the United States to sell automobiles, the company first learned the United States's system and then followed it; the company did not demand that the United States change its laws to make it easier for Toyota to sell cars.

The more American attorneys that understand the workings of the Japanese system, the better equipped they will be when representing Japanese companies and individuals in the United States as well as American companies doing business in Japan. Ignorance dooms one to failure from the start. A course in Japanese law, therefore, is needed to educate would-be "international" American attorneys to work in such a complicated world market.

D. Specific Education for Japan Specialists

There is also a greater demand for education by those wishing to specialize in Japanese law than is generally recognized. Although there are now a fairly large number of scholars in such subjects as Japanese literature, the number of Japanese legal scholars or even specialists in this country is comparatively small. Given the probable role of such individuals in the future of United States-Japan relations on all levels, it is peculiar that more education is not Japan-focused.⁴⁸

46. Increasingly, Japanese economic influence is being felt elsewhere. See, e.g., Nathaniel Nash, *Chile: Japan's Backdoor to the West*, N.Y. TIMES, Apr. 15, 1993, at D1 (noting that while Japan's direct investment in the United States fell in the last two years, it increased dramatically in Chile). One could make the argument, as Nash apparently does, that Japan is carving out an in-road in "our hemisphere" and generating a separate source of raw materials for Japan.

47. See *supra* note 8 (citing American media accounts portraying Japan's legal system as illegitimate).

48. Of the six major universities and colleges in the Chicago area (DePaul University, Loyola

For these Japan specialists (as well as non-Japan specialists), Japanese law could also be appropriately taught as "foreign law" rather than "comparative law." That is, many more American attorneys in the future will be required to understand Japanese law, not on a comparative basis, but on a working basis to advise and direct out-bound legal work, as well as to appropriately represent Japanese clients in the United States.⁴⁹

Therefore, it is important for American law schools to be able to anticipate the future needs of the American attorney. To satisfy the intellectual needs and professional requirements of what is certainly a growing number of American attorneys, we must equip students with a general understanding of Japanese law and be prepared to allow a few to pursue a specialty in Japanese law.

E. Use of Japanese Law as a Pedagogical Tool

Although similar to the above discussion regarding comparative law analysis, perhaps the best reason to offer such a course is its value as a pedagogical tool. The possibilities of using Japanese law as a tool to educate and instruct American law students regarding law and the role of law are unlimited.

First, the study of Japanese law allows American law students (many for the first time in their lives) the opportunity to step outside their Western approach to law and the role of law. In doing so, the student is confronted with how a society such as Japan deals with very similar problems and very familiar laws but reaches outcomes totally unexpected to the American student. For example, Japan faced a legal problem that has confronted many Western nations as they became more urban and modern: as the population shifted from rural to urban centers, the value of each rural vote gradually became more powerful than each urban vote.⁵⁰ For de-

University, Northern Illinois University, Northwestern University, the University of Chicago, and the University of Illinois at Chicago), not one offers an advanced degree in Japanese studies.

49. I have been criticized by some of my colleagues for arguing that Japanese law should be part of the curriculum in American law schools. They say it makes me appear out of touch with the reality of law school curriculum choices, but I intend no such impression. My point is just that we need to take Japan seriously; relations with Japan will not improve based on mutual distrust and misunderstandings. A recent poll indicated that the United States has replaced the Soviet Union as the number one threat to Japan's national security. Colin Nickerson, *U.S., Japan Drift Dangerously Apart*, BOSTON GLOBE, Nov. 25, 1991, at 1. The objective reality is that American attorneys need to know more than just U.S. law in order to adequately represent their clients on a worldwide basis.

50. *Recent Developments: Constitutionality of Electoral Districts and Apportionment of Diet*

cedes, a compromise in Japan on reapportionment could not be reached, largely because the LDP's power base was in the rural areas. Therefore, the LDP was quite understandably reluctant to approve any significant reapportionment.⁵¹

In response, several Japanese special interest groups, mostly led by attorney Tadashi Koshiyama, brought lawsuits challenging the election law's constitutionality.⁵² The first cases were dismissed as presenting political questions in which Japanese courts should not involve themselves.⁵³ Finally, as the proportion of votes reached a ratio of 1 to 3.94, the Japanese Supreme Court held that, given the malapportionment, the election law was unconstitutional; however, the Court refused to invalidate the prior election results.⁵⁴ Thus, the election law was held unconstitutional but valid.⁵⁵

Japanese law, therefore, presents a unique study of the role of law in any given society. If a law can be held unconstitutional yet valid,

Representatives (Prior to 1975 Reapportionment), 9 LAW JAPAN 151, 151-52 (1976) [hereinafter *Recent Developments*].

51. This will be a major issue in the immediate future as the LDP tries to reassert its control of the Japanese Lower House. Although much of the Western media expects immediate change now that the LDP has lost its majority, it is likely that any reapportionment or other political change will happen more gradually than expected. It is crucial to realize that in the election of July 18, 1993, the Japanese legislature became even more conservative. See Robert Neff, *A New Japan?*, BUS. WK., Aug. 2, 1993, at 38 (stating that the election resulted in "a more thoroughly conservative Diet than at any time since World War II").

52. Judgment of Nov. 7, 1986 (Tokyo Election Comm'n v. Koshiyama), Saikosai [Supreme Court], 37 Minshū 1243 (Japan); Judgment of Feb. 5, 1964 (Ishiyama v. Tokyo Prefecture Election Comm'n), Saikosai [Supreme Court], 18 Minshū 270 (Japan).

53. E.g., Judgment of Feb. 5, 1964 (Ishiyama v. Tokyo Prefecture Election Comm'n), Saikosai [Supreme Court], 18 Minshū 270 (Japan). Interestingly, the Japanese Supreme Court cited *Baker v. Carr* as authority for the proposition that courts should not embroil themselves in political questions. See *Baker v. Carr*, 369 U.S. 186 (1961) (holding that an attack on a state's method of apportionment was a justiciable issue as opposed to a political question).

The Japanese Supreme Court made the transition from refusing to deal with the issue based on its status as a political question to acknowledging the unconstitutionality of the statute in Judgment of Apr. 14, 1976 (Kurokawa v. Chiba Prefecture Election Comm'n), Saikosai [Supreme Court], 30 Minshū 223 (Japan). The majority still refused, however, to invalidate the election for fear of disrupting the activities of the legislature. *Id.* at 226; *Recent Developments*, *supra* note 50, at 151-52.

54. See Judgment of Nov. 7, 1983 (Tokyo Election Comm'n v. Koshiyama), Saikosai [Supreme Court], 37 Minshū 1243 (Japan).

55. See generally KOJI SATO, KENPŌ [The Constitution of Japan] 109-11 (1990) (describing the unconstitutional statute and valid elections). On March 4, 1994, Japan's Upper House finally passed watered-down, compromise legislation which nonetheless drastically changes the Japanese election system. Rather than the current multi-seat districts and ludicrous malapportioned districts, under the new system the Lower House will consist of 500 seats, 300 of which will be chosen by single-seat constituencies and 200 of which will be filled by proportional representation. William Dawkins & John Burton, *Reforms That Sunk Two Premiers Passed*, FIN. TIMES, March 5, 1994, at 3.

but not result in rioting in the streets as an American might expect, "law" must mean something different to the Japanese than it does to Americans. The study of this question brings out multiple issues that compound both the difficulty of the analysis and the texture of the debate. Students are forced to retreat intellectually to what they know, to solidify their understanding of it, and, finally, to build on it. In doing so, they begin questioning the role of law in their own society. The stark differences and surprising similarities provoke even more debate and analysis.

The study of Japanese law also provides a unique opportunity to analyze the role of law in a given society because the current Japanese legal system is a relatively recent institution. Prior to 1868, Japan was a feudalistic society.⁵⁶ During the Tokugawa Period (1603-1868), society was governed by military leaders (*shogun*)⁵⁷ via a military elite bureaucracy (*bakufu*),⁵⁸ and conflict was resolved by administrative magistrates.⁵⁹ Litigants had to travel far to reach the nearest administrative center, usually in what is present-day Tokyo,⁶⁰ and were therefore required to seek lodging near the court building. To provide lodging and, at the same time, administrative assistance in getting one's case before the correct magistrate or in drafting documents, a cottage industry of inn-keepers sprung up to supply all of these services. Apparently, these inn-keepers (*kujishi*) were the first Japanese attorneys.⁶¹

During the Meiji Restoration (1868-1910), Japan embarked on an aggressive and quick modernization and Westernization.⁶² In doing so, Japan looked to France and Germany — the two enlightened

56. See KAZUO KAWAI, JAPAN'S AMERICAN INTERLUDE 34-36 (1960) (describing Japanese society during this time).

57. There is a wealth of material discussing the evolution and role of law throughout the various periods of Japan's history. E.g., HIROSHI ODA, JAPANESE LAW 14-34 (1992); Yoshiro Hiro-matsu, *Tokugawa Law*, 14 LAW JAPAN 1 (Dan F. Henderson trans., 1981).

58. For a discussion of the *bakufu* judiciary and its treatment of law, see Carl Steenstrup, *The Legal System of Japan at the End of the Kamakura Period From the Litigant's Point of View*, in LAW AND THE STATE OF TRADITIONAL EAST ASIA 73 (Brian E. McKnight ed., 1987).

59. See ODA, *supra* note 57, at 23 (noting that during the Tokugawa Period, the "informal settlement of disputes . . . by conciliation arranged by local officials or elders was encouraged").

60. Richard W. Rabinowitz, *The Historical Development of the Japanese Bar*, 70 HARV. L. REV. 61, 62-63 (1956).

61. See, e.g., 1 DAN F. HENDERSON, CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN 167 (1965) (stating that the inn-keepers "might be regarded as a predecessor of the modern Japanese lawyer"); Rabinowitz, *supra* note 60, at 64 (stating that the inn-keepers "may properly be regarded as the precursor, in some facets, of the modern lawyer").

62. See, e.g., David & Brierley, *supra* note 25, at 538 (describing the Meiji era as a "complete re-shaping of Japanese society").

societies of the time — for guidance. They used those countries' systems as models for laws and regulations in effectuating their social transformation into a modern state.⁶³ After enacting civil and commercial codes based on German counterparts, Japan became a traditional civil law, or "continental," system by 1899.⁶⁴ During the Allied Occupation, however, Japan adopted a constitution under which all of Japan's courts of general jurisdiction had the power to review the constitutionality of statutes,⁶⁵ and which adopted other indicia of a common law system. This made Japan the only modern, industrialized country in the world with a mixed common law/civil law system. Therefore, in studying the elements of each system and analyzing the successes and failures of the use of law in Japan to effect social change, students study the role of law from a totally new per-

63. For example, the Japanese Penal Code of 1880 and the Code of Criminal Instruction were adaptations of French law; the Civil Code of 1898, the Commercial Code of 1893, and the Code of Civil Procedure had German roots. Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 5-40 (Arthur T. von Mehren ed., 1963); Richard W. Rabinowitz, *Law and the Social Process in Japan*, 10 *TRANSACTIONS ASIATIC SOC'Y JAPAN* 11 (1968), reprinted in *1 LAW AND THE LEGAL PROCESS IN JAPAN* 284 (John O. Haley & Dan F. Henderson eds., 1988).

64. See John O. Haley & Dan F. Henderson, *The Reception of Western Law*, in *1 LAW AND THE LEGAL PROCESS IN JAPAN* 161-63 (John O. Haley & Dan F. Henderson eds., 1988).

65. There are generally two schools of thought regarding the current Japanese Constitution. Some believe that the 1947 Constitution was of Japanese origin (especially Article Nine — the clause renouncing the right to wage war or maintain an army or navy). Others believe that the constitution — including Article Nine — was imposed by the Supreme Commander of the Allied Powers ("SCAP"). Alfred C. Oppler, *The Reform of Japan's Legal and Judicial System Under the Allied Occupation*, 24 *WASH. L. REV.* 290, 296-300 (1949). While the Japanese legislature — the Diet — was to enact the reforms, SCAP enforced the Western view through the use of memoranda to the Japanese government. While these memoranda were not usually implemented by statute, they did become government ordinances. These SCAP directives laid the foundation for the new Constitution, which became effective on May 3, 1947. Instead of suspending the old Constitution, SCAP allowed it to remain; the new Constitution was, in a purely technical sense, a revision of the Meiji Constitution. *Id.* at 294-300; see also Thomas L. Blakemore, *Post-war Developments in Japanese Law*, 1947 *WISC. L. REV.* 632, 637-40 (1947) (implying that the new Japanese Constitution was basically a product of the Diet and public debate). However, it should be noted that the views of Oppler, Blakemore, and others are probably distorted by the fact that they were participants in the Allied Occupation and reform. Indeed, the actual process may have been more directive than the members of SCAP would have preferred. As one commentator noted: "Despite extensive Japanese participation and the willingness of Oppler and others with similar sensitivity to listen to and to accept Japanese opinion, the inexorable conclusion is that the legal reforms were imposed." John O. Haley, 3 *J. JAPANESE STUD.* 440, 442 (1977) (reviewing ALFRED C. OPPLER, *LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK* (1976)). The current and most widely accepted view is that the Allied Occupation imposed the constitution upon the Japanese people. DELMER M. BROWN, *NATIONALISM IN JAPAN: AN INTRODUCTORY ANALYSIS* 249 (1955); KAWAI, *supra* note 56, at 51-52; JOHN M. MAKI, *JAPAN'S COMMISSION ON THE CONSTITUTION* 78-79 (1980); Port, *supra* note 12, at 149-50; Robert E. Ward, *The Origins of the Present Japanese Constitution*, 50 *AM. POL. SCI. REV.* 980, 980-81, 1001-08 (1956).

spective. After all, rather than building new laws or regulations based on existing Japanese codes, many of the current Japanese laws were enacted with disregard for the very Japanese history or aspects of Japanese culture they were trying to impact.⁶⁶ Similarly, miscommunication by both the Japanese and Americans resulted in a constitutional document that is not correctly understood.⁶⁷ Therefore, the student of Japanese law is uniquely able to compare the efficacy of a law that does not take into consideration the values and culture in which the law is to operate with an effective law that does take such values into consideration.⁶⁸

These are the general reasons why Japanese law should be offered in any law school curriculum. First, it is an invaluable tool in any comparative law setting. Second, student demand is clearly present, both on a general and a specialized basis. Third, United States law schools should better equip their students to be active and successful players in the global economy that has developed. Finally, use of Japanese law as a pedagogical tool alone should justify its value as a course in any law school.

III. HOW TO TEACH JAPANESE LAW

A course entitled "Japanese Law" is quite expansive. An analo-

66. See Haley, *Antitrust Enforcement*, *supra* note 19 (discussing Japan's reluctance to implement and enforce antitrust legislation); Ward, *supra* note 65 (discussing U.S. influence on the Japanese constitution). Although Japan has yet to amend the 1946 Constitution, there have been obvious changes in the interpretation of that document that may undermine the intentions of SCAP. For example, Article Nine of the Constitution of Japan is entitled "Renunciation of War" and includes the statement that "land, sea, and air forces, as well as other war potential, will never be maintained." KENPŌ [Constitution] art. IX (Japan). Yet, Japan today has the third largest defense budget in the world. See James E. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Forces "Forever" to the Third Largest Defense Budget in the World*, 53 LAW & CONTEMP. PROBS. 171 (Spring 1990) (discussing the evolution of Japan's national defense through court cases and political party positions); Tomosuke Kasuya, *Constitutional Transformation and the Ninth Article of the Japanese Constitution*, 18 LAW JAPAN 1 (Paul S. Taylor trans., 1985) (discussing theories of constitutional transformation and the Japanese response to changing times and conditions since the Allied Occupation).

67. For a discussion of the misunderstandings between the American and Japanese participants and the ambiguities present in the cross-linguistic, cross-cultural negotiations that led to the new Japanese Constitution, see KYOKO INOUE, *MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING* (1991).

68. These laws, of course, would be laws that come directly from or are codifications of Japanese customs, Confucian ideology, court opinions, village regulations, and family rules. When the Japanese *bakufu* in the Tokugawa Period promulgated statutes, they were generally unsuccessful at changing underlying social practices unless the law conformed to local custom. See DAN F. HENDERSON, *Promulgation of Tokugawa Statutes*, in *TRADITIONAL AND MODERN LEGAL INSTITUTIONS IN ASIA AND AFRICA* 9-10 (David C. Buxbaum ed., 1967).

gous problem would be an American law professor finding herself in Japan about to teach a course called "American Law." The clear question is: Where does one start? Some institutions, when resources allow, deal with this problem by offering a single course on a very focused area of Japanese law, such as business transactions. Without having a foundation in Japanese culture and other areas of law, this would be like teaching land use in an American law school without teaching first-year property. The focused approach may work, but only if significant time and energy is spent setting the stage for the subject matter.

Instead, a general approach to law in Japan seems more appropriate, but it must be narrow enough to allow one basic theme to be pursued during the semester. Using one theme ties various areas of Japanese law and culture together and makes for a far more interesting debate.

Toward this end, I adopt the basic stereotype that the Japanese are not as litigious (or are not as rights-conscious) as Americans. The course becomes a journey in answering the question of why the Japanese do not litigate, or why they appear to be less rights-conscious than Americans. In order to frame this question correctly and thoroughly analyze it, however, the student must understand a variety of tenets of Japanese law. Therefore, the course starts out with a conventional study of Japanese legal history, constitutional law, administrative law, criminal law, contracts, alternative dispute resolution, and litigation. The thesis of explaining the Japanese people's apparent lack of rights consciousness is developed slowly as each subject is approached. Background cultural information and aspects are developed with each subject as needed.

There is one important qualification to the basic question of the course. I have framed the question as: "Why do the Japanese *appear* to be less rights-conscious than Americans?" I use the word "appear" because the systems are so different that the simple numerical comparisons which are prevalent in popular literature have very little probative value.⁶⁹ For example, Japan — which encom-

69. Sam Skinner, the ex-Chief of Staff to President George Bush, spoke at Chicago-Kent College of Law on March 16, 1993. In a direct attack on the evils of having too many lawyers, Skinner claimed that the ratio of American attorneys to Japanese attorneys was approximately 300 to 1. Sam Skinner, Remarks at Chicago-Kent College of Law (Mar. 16, 1993). Since there are about 800,000 attorneys in the United States, according to Skinner's figures, that would mean there are only about 2,700 lawyers in all of Japan. In reality, there are about 90,000 attorneys in Japan; Skinner underestimated the figure by about thirty-three times. It shocked me that the ex-

passes approximately the same square area as Montana — has one-half the population of the U.S.⁷⁰ but only one-tenth the number of attorneys,⁷¹ one-fourth the per capita crime,⁷² and a small fraction of the per capita civil litigation.⁷³ These numbers appear to indicate that there is simply less law to practice in Japan because the Japanese are not all that interested in using the law. However, because the American and Japanese systems are so different, that conclusion does not necessarily follow.⁷⁴

Japanese attorneys are more similar to the British barrister than the American attorney in that Japanese attorneys generally focus on litigation rather than on other areas of the law.⁷⁵ On the other hand, those Japanese citizens with undergraduate degrees in law (an LL.B.) usually perform the same functions as an American attorney — from negotiating contracts and drafting documents to initial filings of lawsuits.⁷⁶ Therefore, the fact that Japan has one-tenth the raw number of attorneys of the United States is, by itself, meaningless.

This aside, four different theories are used to explain why the

Chief of Staff to a President of the United States was so unaware of the real facts regarding Japan and apparently unconcerned about discerning the truth. The attitude exemplified by Skinner gives a course in Japanese law even greater importance.

70. The estimated population of Japan in 1992 was 124,460,000. 1994 WORLD ALMANAC AND BOOK OF FACTS 778 (Robert Famighetti ed., 1993).

71. There are approximately 90,000 attorneys in Japan, compared to about 800,000 in the United States. See ODA, *supra* note 57, at Appendix 1 (citation omitted). The figure of 90,000 includes not only attorneys, but all those engaged in the legal profession and other professions related to the law. *Id.*

72. *Id.* at Appendix 8 (citation omitted).

73. See *id.* at 87.

74. See *id.* (noting that making comparisons using pure numbers can be misleading due to the differences in court systems). In fact, it is even difficult to find consistent numbers on how many "attorneys" there are in Japan because one has to first define "attorney." Depending upon the source and definition, there are between 80,000 and 124,000 attorneys in Japan. Compare Marc Galanter, *Pick a Number, Any Number*, LEGAL TIMES, Feb. 17, 1992, at 26, available in LEXIS, Nexis Library, CURRNT file (stating that Japan has 124,000 attorneys) with ODA, *supra* note 57, at Appendix 1 (claiming that the number of Japanese citizens involved in the legal and related professions, including attorneys, was approximately 90,000 in 1986) (citation omitted).

75. See ODA, *supra* note 57, at 103 (stating that "Japanese attorneys concentrate on litigation and matters directly related to it").

76. For example, there were 13,159 attorneys in Japan in 1986. However, Oda claims that there were also 47,342 tax attorneys, 15,260 judicial scriveners (who draft legal documents), 2,947 patent attorneys, and 1,173 public prosecutors. *Id.* at Appendix 1 (citation omitted). For a discussion of the various legal jobs performed by individuals other than attorneys, see DAN F. HENDERSON, FOREIGN ENTERPRISE IN JAPAN 179-85 (1973); ODA, *supra* note 57, at 94-110; THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 549-65 (Hideo Tanaka ed., 1976) [hereinafter JAPANESE LEGAL SYSTEM].

Japanese appear to be less rights-conscious than Americans. An understanding of these four models is necessary in order for the student to place Japanese legal scholarship in context.

A. *The Traditionalist Theory*

The first and, until quite recently, only explanation for why the Japanese do not litigate was simply that the Japanese are a homogeneous people with two thousand years of history, which provides them with a greater social obligation to avoid confrontation and pursue harmony.⁷⁷ Stated another way, the Japanese simply do not have an interest in the law or in asserting abstract legal principles, and they appear to forego rights in order to avoid offending the party against whom they could file suit.⁷⁸

The role of apology is usually used as an example of the traditionalist's view of the role of law in Japan.⁷⁹ Apology is as big a part of

77. See TAKEYOSHI KAWASHIMA, *NIHONJIN NO HO ISHIKI* [Japanese Legal Consciousness] 15-36 (1967) (noting that the Japanese lack consciousness of a legal system and claiming that this primitive attitude has the ability to protect them and prevents them from using their legal system). See also Tetsuya Obuchi, *Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects, With Special Emphasis on In-Court Compromise*, 20 LAW JAPAN 74 (1987) (positing that the Japanese reluctance to disrupt social harmony enforces efforts to compromise, and litigation is thus a last resort); Yosiyuki Noda, *Nihon-Jin No Seikaku To Sono Hō-Kannen* [The Character of the Japanese People and Their Conception of Law], 140 MISUZU 2, 14-26 (1971), reprinted in JAPANESE LEGAL SYSTEM, *supra* note 76, at 295 (contrasting the Japanese homogeneity of thinking and conception of law with that of the West); Charles R. Stevens, *Japanese Law and the Japanese Legal System: Perspectives for the American Business Lawyer*, 27 BUS. LAW. 1259, 1272 (1972) (attributing the "paucity of litigation" in Japan to the "Japanese feeling that relations . . . should be based upon a warm subjective relationship which can solve every practical problem by mutual compromise and accommodation").

78. This theory is best stated in the Shōtoku Constitution. The Shōtoku Constitution is attributed to Prince Shōtoku Taishi (573-621), although it was most likely drafted as a tribute to him some time after his death. David A. Funk, *Traditional Japanese Jurisprudence: Justifying Loyalty and Law*, 17 S.U. L. REV. 171, 178 (1990). Article I of the Shōtoku Constitution exemplifies the Confucian approach to law and society that Traditionalists espouse today. *Id.* Article I provides:

Harmony is to be valued, and an avoidance of wanton opposition to be honored. All men are influenced by partisanship, and there are few who are intelligent. Hence there are some who disobey their lords and fathers, or who maintain feuds with the neighboring villages. But when those above are harmonious and those below are friendly, and there is concord in the discussion of business, right views of things spontaneously gain acceptance.

Kenpō [Constitution] art. I (Japan).

79. Viewing apology as a consequence of tradition is often discussed in terms of social ordering; that is, there is an assumed traditional social harmony (*wa*) that apology seeks to restore. See Dean J. Gibbons, *Law and the Group Ethos in Japan*, 3 INT'L LEGAL PERSP. 98, 109-20 (1990); V. Lee Hamilton & Joseph Sanders, *Punishment and the Individual in the United States and Japan*, 22 LAW & SOC'Y REV. 301, 304-05 n.7 (1988); Hiroshi Wagatsuma & Arthur Rosett,

Japanese law as any code or ruling. Many major civil cases have been instituted or continued simply because the defendant would not apologize,⁸⁰ and many statutes have specific provisions allowing the judge to grant a remedy requiring the defendant to offer a specific apology and publish it in the appropriate newspaper.⁸¹ Apology is also considered the first step in criminal law;⁸² the criminal defendant who readily admits his mistake and apologizes is treated much more leniently than one who professes innocence regardless of the truth.⁸³ Therefore, to the traditionalist, the fact that a simple apology can have such an effect is further evidence that the Japanese litigant is really more interested in mending the problem than in seeking remuneration for the harm done.

An easy response to the traditionalist is to point to Japanese conduct in claiming and protecting intellectual property rights both in Japan and abroad. For example, since 1985, Japanese companies have filed for more patents in the United States than American companies.⁸⁴ Japanese companies continue to file nearly four times as many patents in the United States as the next highest foreign applicant.⁸⁵ If the Japanese were truly not rights-conscious and al-

The Implications of Apology: Law and Culture in Japan and the United States, 20 LAW & SOC'Y REV. 461, 463 (1986).

80. For example, in 1964 a large class action suit was filed on behalf of injured children against a manufacturer of thalidomide. During settlement negotiations the plaintiffs "repeatedly requested" the inclusion of an express apology in the settlement agreement. *Diary of a Plaintiffs' Attorneys' Team in the Thalidomide Litigation*, 8 LAW JAPAN 136, 183-84 (1975). Similarly, Japanese plaintiffs demanded an apology for disfigurements caused by pollution released by a corporation. Judgment of Mar. 20, 1973 (Watanabe v. Chisso K.K.), Chisai [District Court], 15 Hanji 1641 (Japan). The apology was only accepted after a company official swore on his knees that the compensation would be in good faith. FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 47 (1987). These examples illustrate the theory of John Haley: that apology can be an end in and of itself as an informal sanction, thus reinforcing the importance of social ordering. John O. Haley, *Comment: The Implications of Apology*, 20 LAW & SOC'Y REV. 499, 500 (1986).

81. Many statutes have specific provisions granting the judge or appropriate arbiter the power to require the non-prevailing defendant to publish an apology. See, e.g., Copyright Act, Law No. 48, 1970, as amended, art. 115. There have been no reported cases determining whether such a published apology would provide a breach of contract cause of action if the defendant subsequently continued to infringe or infringe in some other manner.

82. For a discussion of the role of apology in Japanese criminal law, see John O. Haley, *Confession, Repentance and Absolution*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY* 195-211 (Martin Wright & Burt Galaway eds., 1989).

83. *Id.*; Hamilton & Sanders, *supra* note 79, at 304-05; Tetsuya Obuchi, *Role of the Court in the Process of Informal Dispute Resolution*, 20 LAW JAPAN 74, 80 (1987).

84. *Patents: Hidden Agenda*, ECONOMIST, Nov. 20, 1993, at 100.

85. Japanese companies filed nearly 40,000 patent applications in the United States, compared to Germany, the next highest foreign applicant, which filed slightly more than 10,000 such appli-

lowed "harmony" to govern all relations, one would not expect such aggressive protection of intellectual property both in Japan and abroad.

B. *The Revisionist Theory*

The revisionist does not accept the theory that harmony is the glue that holds Japanese society together and that the Japanese would rather forego their legal rights than disturb that harmony. The revisionist believes that the Japanese forego rights not because they affirmatively want to, but because their system is so inept at dealing with their case that they are forced to forego these rights.⁸⁶

To the revisionist, the Japanese system is full of institutional disincentives to prosecuting a lawsuit. First, Japanese cases take a long time to litigate. Based on the continental, civil law model, trials are not contiguous events. Rather, a Japanese trial consists of half-day (sometimes one-half hour) sessions once every month or so, spread out over a period of years. There is essentially no discovery under the Japanese system, and plaintiffs therefore tend to use the trial itself as discovery or to change their legal theory and claim for damages as the trial progresses.⁸⁷

In addition, litigation in Japan is extremely expensive. Filing fees are calculated based on a percentage of the damages claimed in the complaint.⁸⁸ For example, in a case where \$400,000 is claimed in damages, the plaintiff would have to pay the court approximately \$2,000 in filing fees. Although contingency fees are not prohibited in Japan, they operate differently than those used in the U.S. — in Japan, the plaintiff must pay a percentage of the claimed damages to a private attorney as a retainer.⁸⁹ To continue with the above example, where a plaintiff claims damages in the amount of

cations. 1992 ANN. REP. COMM'R PATS. & TRADEMARKS 64.

86. See John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

87. Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation in Japan: A Structural Analysis*, 25 INT'L LAWYER 443, 444-47 (1991). There are no juries in Japan. Although Japan experimented with juries for a short time during the Taisho Period (1910-1925), juries were used with decreasing frequency during the militarization of Japan leading up to World War II, and they were finally suspended in 1943. See generally ODA, *supra* note 57, at 77-79 (discussing the introduction and demise of the Japanese jury system).

88. Yamanouchi & Cohen, *supra* note 87, at 453. In 1993, Japan's commercial code was amended, however, to provide for flat-rate filing fees of 8,700 yen (approximately \$80) for shareholder derivative suits. Eugene Danaher, *Products Liability Overhaul; Strict Liability is Coming to Japan*, NAT'L L.J., Feb. 7, 1994, at 25, 29.

89. Yamanouchi & Cohen, *supra* note 87, at 448.

\$400,000, the plaintiff would have to pay out approximately \$22,000 in fees before the case could even be filed. Additionally, if the plaintiff is successful, the attorney usually charges a success fee based on the amount of the awarded damages.⁹⁰ In the end, the successful plaintiff may ultimately receive approximately 90 percent of the claimed damages, rather than the 66 percent a plaintiff would receive in a typical American-style contingent fee case. However, because the up-front costs are so high (that is, the amount the plaintiff has "at risk"), the system appears to deter people from instituting litigation.

The revisionist also sees much more interest in law itself among the Japanese than does the traditionalist. Where the traditionalist sees the low number of lawyers as an indication of the low interest in law among the Japanese, the revisionist sees it as an artificial distinction. Law is an undergraduate degree in Japan, and many people who are not "lawyers" engage in legal work.⁹¹ If one includes all non-attorneys doing law-related work that would usually be done by lawyers in the United States, the per capita number of individuals involved in the law is much more even.⁹² In fact, the ABA recently published an article claiming that there are *more* "law providers" in Japan per 10,000 people than in the United States.⁹³

Furthermore, to the revisionist the low number of attorneys in Japan is not so much an effect as a cause; if there were only more attorneys, people would be much more willing and interested in asserting their rights. However, because only two percent of the applicants each year pass the Japanese bar examination⁹⁴ and because

90. *Id.*

91. See *supra* note 76 and accompanying text (discussing the role of non-attorneys in the Japanese legal system).

92. See ODA, *supra* note 57, at 102.

93. Ray August, *The Mythical Kingdom of Lawyers: America Doesn't Have 70% of the Earth's Lawyers*, 78 ABA J. 72 (Sept. 1992). August claims that there are 31.71 law providers per 10,000 people in Japan and 28.45 law providers per 10,000 people in the United States. *Id.* at 73. These figures, however, are very easily questioned. While it is true that non-lawyers do much of the law-providing work in Japan, August calculated "law providers" as the total number of students holding undergraduate law (LL.B.) degrees. He bases his calculation on the inappropriate assumption that all LL.B. holders have gone on to do law-providing work. This is, of course, an unsustainable assumption without real data to support it. To assume that all Japanese LL.B. holders are "law providers" misrepresents the data in a manner no different (although in an opposite direction) from Dan Quayle's misrepresentation of data when he said that 70 percent of the earth's lawyers are American attorneys. *Id.* at 72.

94. John O. Haley & Dan F. Henderson, *Judges, Procurators, Attorneys and Then Some*, in 2 LAW AND THE LEGAL PROCESS IN JAPAN 225, 231, 233 (John O. Haley & Dan F. Henderson eds., 1988).

there is a virtual lock on the number of new admissions each year (about 550),⁹⁵ Japanese people forego their rights not because they want to, but because they have no choice.

One of the more extreme examples of a revisionist is James Sterngold of the *New York Times*. Positing yet another weakness of the Japanese legal system, Sterngold believes that because Japanese courts lack contempt power, they are powerless to enforce their judgments.⁹⁶ According to Sterngold, successful Japanese litigants must find alternative ways of collecting judgments. To do this, Sterngold believes, the successful Japanese litigant enlists the services of the *yakuza*, or Japanese mob, to collect damage awards for him.⁹⁷ If this is true on something other than an isolated basis, it clearly does represent a system that is broken. There is insufficient information, however, to determine whether Sterngold's assertions are true.

According to the revisionists, another reason the Japanese are forced to forego their legal rights is that there is a negative stigma associated with being involved in a lawsuit in Japan. Most Japanese people generally believe that both parties to a lawsuit have somehow failed in their larger social obligations;⁹⁸ if the litigants had done their duty to avoid conflict, no such suit would be necessary. In fact, it is not unusual for a Japanese person to be ostracized from his or her community or neighborhood for simply being involved in a lawsuit — especially a criminal case.⁹⁹

Professor John Haley recently published a book, *Authority Without Power*,¹⁰⁰ that will soon become a classic in this area. It is also an excellent expression of revisionist thinking on Japanese law. Professor Haley argues that at least some aspects of the role of law in Japan can be explained by the age-old bifurcation of authority and

95. See JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 107, 110-11 (1991). [hereinafter HALEY, *WITHOUT POWER*].

96. Sterngold, *Rigged Casino*, *supra* note 8, at 48 (implying that the Japanese judiciary's lack of contempt powers leaves it so powerless that successful plaintiffs sometimes resort to hiring mobsters to help collect their judgments).

97. *Id.*

98. See DAVID & BRIERLEY, *supra* note 25, at 542-43.

99. This evaluation of litigants may be linked to the proverb which elucidates the Japanese impression of blame: "*kenka ryo seibai*," which means "in a quarrel, both parties are to blame." See Judgment of Jan. 25, 1932 (*Osada v. Japan*), Daishin'in [Great Court of Judicature], 11 Daihan Keishū 1 (Japan).

100. See HALEY, *WITHOUT POWER*, *supra* note 95.

power.¹⁰¹ As an example, Haley discusses the practice by which Japanese emperors used to recognize *shogun* as the supreme national government. *Shogun* were essentially large land holders who consolidated their control by making the remaining land holders, or *daimyo*, recognize them either by military force or by economic necessity.¹⁰² These *shogun* would travel to the Emperor's court, surround his castle with *samurai*, and request recognition. Until the Emperor recognized the *shogun*, a *shogun* was only a powerful landholder; but upon purely symbolic recognition by the Emperor, the *shogun* instantly obtained national recognition as the legitimate government.¹⁰³ Although there were periods in Japanese history where the Emperor ruled directly, this was the general manner of succession of governments in pre-Tokugawa Japan.¹⁰⁴

The *shogun's* authority to govern remained with the Emperor, usually in a geographically-removed castle. Although the authority was respected and the holder of that authority — the Emperor — had to recognize the *shogun* before his government was deemed legitimate, it was an entirely symbolic entity: the Emperor did not have the *power* to rule, and the *shogun* did not have the *authority* to rule.¹⁰⁵

Japanese courts, Haley argues, act in a similar way. Japanese courts lack contempt powers, so while a court may issue a judgment, it lacks the power to enforce it.¹⁰⁶ The other branches of the Japanese government today rule in much the same manner. Through *gyosei shido*, or administrative guidances — suggestions from governmental agencies that are not law but are complied with by Japanese corporations and individuals as if they were — the Japanese government rules with the “authority” — but not the “power” — to enforce its guidances.¹⁰⁷ Therefore, law becomes a tool used by the government to build and perhaps shape consensus, but not to coerce a predetermined outcome. Or, as Haley puts it, “a rule of law by command without coercion prevails.”¹⁰⁸

101. *Id.* at 33-49.

102. *See id.* at 33.

103. *Id.* at 36.

104. *Id.* at 33-49.

105. *See id.* at 35-36.

106. *Id.* at 118.

107. *Id.* at 160-68.

108. *Id.* at 200.

To me, Haley remains a revisionist;¹⁰⁹ that is, he believes the Japanese cannot assert their rights against the government or other individuals because the government is too weak to recognize and enforce individual rights on a coercive basis. Because law is consensual, the government cannot issue rigid orders directing compliance; the government lacks such power. Therefore, I presume that Professor Haley's response to why the Japanese do not litigate would still be: "Because they can't." The courts have authority to hear cases but not the power to enforce judgments, and the government has the authority to rule but not the power to coerce behavior.

C. *The Rationalist Theory*

The rationalist believes that the Japanese are less rights-conscious, not because their system is broken, but because it works too well.¹¹⁰ The rationalist subscribes to the theory that the would-be Japanese litigant fully understands the likely outcome of the litigation and instead chooses to settle, confident that he would not fare substantially better if he litigated the case to judgment.¹¹¹

The primary example offered in support of this position is that individuals involved in traffic accidents tend not to litigate, but successfully settle at amounts equal to or exceeding what they would have recovered if they had pursued the litigation.¹¹² If the traditionalist is correct, would-be plaintiffs would not assert their rights but would instead apologize and not pursue recovery, even by way of settlement. If the revisionist is correct, would-be plaintiffs would forego asserting their rights because they feel the system is incapable of compensating their injuries. However, traffic accident victims — almost exclusively strangers, with no social ties to the wrong-doer — do assert their rights and recover at least as much as they would have recovered if they had litigated.¹¹³ To the rationalist, this indicates that the Japanese simply know their system too well and

109. I have only respect for Professor Haley and I hope no offense is taken by this categorization.

110. See J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604 (1985) (approaching antitrust law as a case study in the role of litigation in Japan); J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989) (using empirical evidence of traffic accident disputes to analyze the behavior of Japanese litigants).

111. Ramseyer & Nakazato, *supra* note 110, at 270-81.

112. *Id.*

113. *Id.*

would rather choose a wealth-maximizing course than waste time and energy litigating.

D. *The Informalist Theory*

Finally, the informalist believes that the role of law in Japan is (obviously) an informal one.¹¹⁴ Because of this characteristic, the informalist believes that law is used to suppress people and to disperse social tension, and was generally used to keep the LDP in power.¹¹⁵ Where the traditionalist believes that alternative dispute resolution techniques aid people in asserting their rights, even while fulfilling each party's duty to maintain social harmony, the informalist sees alternative dispute resolution as a subterfuge. It was used by the ruling LDP only to appease the populace and thereby maintain the LDP's power. Whenever tension over a specific issue such as pollution arose, the government set up alternative dispute resolution centers to deal with individual claims. This prevented people from forming a more powerful group and pressing for greater rights which might have undermined the LDP's power base.

A primary example cited by informalists as evidence that the law is used as a subterfuge by those in power is the Minamata pollution case.¹¹⁶ When the people in Minamata started getting ill from mercury poisoning, they blamed Chisso, a local chemical company. However, because they could not establish a clear causal link, the company offered only small amounts of compensation as sympathy payments.¹¹⁷ The local and regional governments then established mediation committees in an attempt to settle the dispute.¹¹⁸ These were also largely ineffective in compensating victims because no one could establish the causal link required by law.¹¹⁹ Finally, the victims formed a group to prosecute their claims against Chisso. As public opinion in favor of the group gained momentum, the judges in the case relaxed the causal requirement to allow for compensation.¹²⁰ Although victorious, the Minamata victims were not satisfied until Chisso's president personally and sincerely apologized and

114. *E.g.*, UPHAM, *supra* note 80, at 166.

115. *Id.* at 28-30; *see also supra* note 51 and accompanying text (discussing how the LDP has subsequently lost its majority power in the government).

116. *See* UPHAM, *supra* note 80, at 30-77.

117. *Id.* at 31-32.

118. *Id.* at 32.

119. *Id.* at 32-34.

120. *Id.* at 45-46.

accepted responsibility for his company's crimes.¹²¹

Only when it was clear that Chisso was going to lose did the government become more sympathetic toward the Minamata victims and their claims. According to the informalists, if the group had not been formed and public opinion had not swayed in its favor, the LDP would have continued to support Chisso and resist any notions of change. The individuals would have remained uncompensated, and the pollution would have continued unabated. It was only because the group was *also* able to take advantage of the informal nature of Japanese law that the individual victims were able to recover.

The above models are presented for their edification value, not in an effort to choose which is correct. In fact, each one is correct to a certain extent. Although each is framed by its proponents as mutually exclusive, the Western concept of mutual exclusivity is not prevalent in Japan. This is where the student is left as the course wraps up. By this indirect route, he has learned that the Japanese do not mind dichotomies; in fact, the Japanese revel in dichotomies which foil Westerners.¹²² If we often do not understand a Japanese dichotomy, it only proves to the Japanese that they are somehow uniquely unique — impossible to understand by foreigners.

However, these dichotomies are not that problematic; it simply takes time and depth of study. At some point, one realizes that there cannot be one mutually exclusive answer. In fact, the answer may not be any of the above. Further study is most certainly required to establish one rational theory that explains why Japan is apparently not rights-conscious. As one Zen master once said, the world is not how one sees it; neither is it any different.

IV. CONCLUSION

Japanese law can and should be a serious course offered in law school curricula. The study of Japanese law provides a unique opportunity for students to step outside their own system and study the role of law in a modern industrialized nation — a nation that has only recently adopted modern notions of jurisprudence. If the goal

121. *Id.* at 47.

122. That is, the Japanese may have a greater ability to deal with ambiguity. See Wagatsuma & Rosett, *supra* note 79, at 464-66. In fact, it is my opinion that the Japanese thrive on ambiguity. It is their apparent obsession with detail, yet fascination with ambiguity, that proves very frustrating for Americans trying to do business in Japan.

of law is to effect transformative social change, this would be a good starting point to understand the role of law in any society.

More importantly, however, the study of Japanese law in and of itself is not as important for the average American law student as the experience of understanding and explaining a system different from her own. This experience enriches the student and better equips her for analysis and discussion of her own system. Once a student studies how culture-bound law is in Japan, it is a simple next step to inquire into the reasons for why law developed as it did in America.

